Appeal of Certification of Consistency

C20215-A4

Step 1 - Appeallant(s) Information

Appellant Representing:	Central Delta Water Agency
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Step 2 - Covered Action being Appealed

Covered Action ID:	C20215
Covered Action Title:	Lookout Slough Tidal Habitat Restoration And Flood Improvement Project
Agency Subject to Appeal:	California Department of Water Resources
Contact Person Subject to Appeal:	Heather Green
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Covered Action Description:	The Proposed Project would restore within the Proposed Project Site approximately 3,165 acres of tidal wetland habitat, including habitat that is beneficial to Delta Smelt (Hypomesus transpacificus), and other fish and wildlife species. The Proposed Project was designed to provide multiple benefits, including improved flood conveyance. It would widen a portion of the Yolo Bypass to increase flood storage and conveyance, increase the resilience of levees, and reduce flood risk. Flood improvement elements as proposed are consistent with the Central Valley Flood Protection Plan, which calls for multi-benefit projects that expand the Yolo Bypass while incorporating ecosystem-enhancing features. To accomplish this, a new setback levee would be constructed to the east of Duck Slough and south of Liberty Island Road. The Shag Slough Levee would be breached in nine locations to provide tidal inundation to the areas within the Bowlsbey and Liberty Farms Properties. The Vogel Levee would also be breached in two locations to provide tidal inundation to the areas within the Vogel Property. These breaches would also allow food for Delta Smelt that is produced within the new tidal wetland areas to be exported to the waterways of the Cache Slough Complex. The Shag Slough Levee would also be lowered at two locations to allow floodwaters from the Yolo Bypass to be conveyed across and stored within the Proposed Project Site during flood events. The Cache/Hass Slough Levee would undergo a series of improvements, remain in place, and function as a training levee to maintain stage differences between the Proposed Project Site and Cache and Hass Sloughs. Upon completion, the Proposed Project would protect approximately 3,400 acres of open space in perpetuity, including approximately 3,165 acres of tidal marsh and subtidal habitats and 149 acres of seasonal floodplain habitat in Solano County, California, and a very small portion of Yolo County,

California. Restoring these habitats will increase food availability for Delta Smelt, Steelhead – Central Valley Distinct Population Segment (DPS) (Oncorhynchus mykiss), Chinook Salmon – Sacramento River winter-run Evolutionarily Significant Unit (ESU) (Oncorhynchus tshawytscha), Chinook Salmon – Central Valley spring-run ESU, Green Sturgeon – Southern DPS (Acipenser medirostris), and Longfin Smelt (Spirinchus thaleichthys), known hereafter as "Target Protected Fish Species," as well as other native fishes within the Project Site and the surrounding Cache Slough Complex. It will also provide rearing habitat for Delta Smelt and salmonids, provide potential spawning habitat for Delta Smelt, and create habitat conditions for other aquatic and terrestrial wetland-dependent species, such as giant garter snake (Thamnophis gigas), that utilize the combination of Sacramento-San Joaquin River Delta habitat interfaces (i.e., Delta-freshwater, aquatic-tidal, marsh-floodplain, seasonal wetland-lowland grassland). Additionally, the Proposed Project would create over 40,000 acre-feet of transitory flood storage at the Delta confluence. The Lookout Slough Tidal Habitat Restoration and Flood Improvement Project was developed to partially fulfill a requirement under the 2008 U.S. Fish and Wildlife Service (USFWS) Delta Smelt Biological Opinion on the Coordinated Operations of the federal Central Valley Project and the State Water Project (2008 USFWS BiOp) to restore 8,000 acres of tidal habitat. Restoration of tidal habitat also would provide access for salmonid rearing at the Project Site and therefore was expected to be credited toward a restoration requirement in the 2009 National Marine Fisheries Service (NMFS) Biological Opinion and Conference Opinion on the Long-Term Operation of the Central Valley Project and the State Water Project (2009 NMFS BiOp). These restoration requirements in the 2008 USFWS BiOp and 2009 NMFS BiOp were carried forward as baseline conditions in the USFWS Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the Central Valley Project and the State Water Project (2019 USFWS BiOp) and the NMFS Biological Opinion on Long Term Operation of the Central Valley Project and the State Water Project (2019 NMFS BiOp), which are the currently effective biological opinions governing coordinated operations of the Central Valley Project and State Water Project. The 8,000-acre tidal restoration requirement also is a condition (Condition 9.1.1) of the Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2081-2019-066-00) (2020 LTO ITP), issued by the California Department of Fish and Wildlife on March 31, 2020. The 2020 LTO ITP is DWR's California Endangered Species Act authorization to carry out ongoing State Water Project operations. The following names/locations in this project description describe specific areas, as well as levees and sloughs, within and adjacent to the Proposed Project Site: Bowlsbey Property – Approximate 1,644-acre property in the northwestern portion of the Proposed Project Site bounded by Liberty Island Road to the north, Shag Slough to the east, Lookout Slough to the south, and Duck and Hass Sloughs to the west. Liberty Farms Property – Approximate 1,678-acre property in the southeastern portion of the Proposed Project Site bounded by Lookout Slough to the north, Lookout and Cache Sloughs to the west, the cross levee to the south, and Shag Slough to the east. Vogel Property – Approximate 55-acre property in the southwestern portion of the Proposed Project Site bounded by the Bowlsbey Property to the north and Cache Slough to the south, east, and west. Shag Slough Levee – State Plan of Flood Control (SPFC) levee on the west side of Shag Slough, which borders the eastern boundaries of the Bowlsbey and Liberty Farms Properties. The Shag Slough Levee is part of the Yolo Bypass West levee system. Cache/Hass Slough Levee – SPFC levee located on the north side of Cache and Hass Sloughs, which borders the southern boundaries of the Bowlsbey and Liberty Farms Properties. The Cache/Hass Slough Levee is part of the Yolo Bypass West levee system. Cache/Hass Slough Training Levee – The Proposed Project includes improvements to the stability of the Cache/Hass Slough Levee and the Cross Levee. The improved levee would function to maintain stage differences between the Proposed Project Site and waters in Cache/Hass Slough during bypass flooding events. The Cache/Hass Slough Training Levee refers to the Cache/Hass Slough Levee and the Cross Levee in their modified post-project state and altered function. Duck Slough Setback Levee – Proposed SPFC setback levee proposed as part of the Yolo Bypass levee system, located on the eastern side

of Duck Slough and the southern side of Liberty Island Road. Cross Levee – SPFC levee on the southern end of the Proposed Project Site, runs roughly west-east between Cache and Hass Sloughs. Vogel Levee – Existing agricultural levee located on the eastern, southern, and western boundaries of the Vogel property. Lookout Slough – Man-made drainage/water control channel that separates the Bowlsbey and Liberty Farms Properties. Lookout Slough is not connected to Cache Slough and is not open to tidal inundation. Duck Slough – Man-made drainage/water control channel that forms the western boundary of the Bowlsbey Property. Duck Slough is not connected to Hass Slough and is not open to tidal inundation. Sycamore Slough – Remnant of a historical slough, which is no longer connected to Hass Slough and is not open to tidal inundation.

Step 3 - Consistency with the Delta Plan

DELTA PLAN CHAPTER 2

b. G P1(b)(3)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(3) - **Best Available Science**

G P1(b)(3)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(3) provides that, relevant to the purpose and nature of the project, all covered actions must document use of best available science. For more information, see Appendix 1A, which is referenced in this regulatory policy.

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

The project does not use best available science as defined in the Delta Plan. Inadequate analysis of the water quality implications of the project is one example of this deficiency. The draft EIR evaluated the project's impacts on salinity using results from a simulation modeled and analyzed only for the year 2009. The selection of a single year does not account for uncertainties and variations found in the hydrologic conditions of the Delta and does not constitute making use of best available science. Standard technical analyses for other projects typically use longer simulation periods that cover a variety of hydrological conditions to evaluate the potential consequences of a project with an effect on Delta hydrodynamics. This approach was not inclusive or objective. While in the final EIR DWR expanded the modeling analysis to include an analysis of potential impacts over three different calendar years (all which occur as part of a multi-year drought period), this modeling failed to include analysis of salinity in critically dry years. In addition, DWR has mischaracterized its modeling efforts as predictive, when it is not. (See, e.g., 21.10.8 LOS Agency Info Mtg PPT WQ Only, pp. 7-8, 19.) These actions lack transparency and openness. DWR's assumption that compliance with D-1641 EC standards would mean there will be no impacts on Delta agriculture did not use best available science. Despite modeling for the project showing potential EC changes for agricultural users within the Central and South Delta (21.10.8 LOS Agency Info Mtg PPT WQ Only, p. 19.), the project's impacts on agricultural productivity from increased salinity of irrigation water and buildup of soil salinity were ignored. Soil salinity can have a negative impact on agricultural production, and can be difficult to impossible to manage in areas with a low permeability soils or high groundwater, such as many parts of the Delta. (See UC Soil Salinity Mgmt Fact Sheet, 2020 and SD Leaching Fractions Study Summary.) The limitations on use of

leaching to address salinity, make maintenance of good water quality for beneficial agricultural uses in the Delta essential. DWR failed to use best available science when it ignored cumulative and long term effects of reduced flows through the Delta and corresponding increases in salinity in the Central and South Delta. DWR's analysis of water quality impacts moreover was never peer reviewed. The reference to some of the studies upon which DWR relied being peer reviewed fails to meet this criteria. Supporting Evidence: Lookout Slough Agency Information PPT re: Water Quality UC Soil Salinity Management Fact Sheet South Delta Leaching Fractions Study Summary 21.10.8 LOS Agency Info Mtg PPT WQ only.pdf, UC Soil Salinity Mgmt Fact Sheet.pdf, SD Leaching Fractions Study Summary.pdf

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DELTA PLAN CHAPTER 3

WR P1 / Cal. Code Regs., tit. 23, § 5003 - **Reduce Reliance on the Delta through Improved Regional Water Self-Reliance**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

DWR is incorrect in its claim that WR P1 does not apply. Water suppliers served by the SWP will receive water as a result of the project because the project is a condition of water export from the Delta. DWR has not provided any information as to how its water contractors are reducing reliance on the Delta. This covered action increases, rather than reduces, reliance on the Delta in that it satisfies restoration requirements in the Biological Opinions that are preconditions to continued diversions from the Delta by the SWP and CVP. Both projects supply water for use in urban and agricultural areas. The SWP claims that 24 million people depend in part on water diverted from the Delta. If such diversion from the Delta was reduced or restricted, water would have to be supplied from other sources including conservation, reclamation and desalination, thereby reducing reliance on the Delta. The SWP was to be entirely self- supporting including providing salinity control for the Delta and preservation of fish and wildlife. The subsidy and assistance in satisfaction of the Biological Opinion requirements increases, rather than reduces, reliance on the Delta. DWR fails to provide any information about how SWP contractors are reducing reliance on the Delta.

WR P2 / Cal. Code Regs., tit. 23, § 5004 - **Transparency in Water Contracting**

Is the covered action inconsistent with this portion of the regulatory policy?

No Action

Answer Justification:

DELTA PLAN CHAPTER 4

ER P1 / Cal. Code Regs., tit. 23, § 5005 - **Delta Flow Objectives**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

This project would significantly affect flow in the Delta. The project will increase the loss of freshwater through evaporation from the water surfaces, wetland vegetation and conversion of range land to irrigated

agriculture. It will also result in more flow going into and through the Yolo bypass rather than down the Sacramento River and into the interior of the Delta through the Cross Chanel and Georgiana Slough. (21.10.8 LOS Agency Info Mtg PPT WQ Only, p. 19.) Modeling prepared for the project is incomplete and does not demonstrate compliance with SWRCB flow objectives. 21.10.8 LOS Agency Info Mtg PPT WQ only.pdf

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ER P2 / Cal. Code Regs., tit. 23, § 5006- **Restore Habitats at Appropriate Elevations**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

The action is within the current tidal zone. With the projections of sea level rise, the project is too far down in the system and will be more a permanently flooded tide water area than a periodically inundated floodplain. The project area is also likely to propagate predatory species of fish. DWR admits that the project is not completely within the intertidal habitat range. Thus, the project is not consistent with ER P2.

ER P3 / Cal. Code Regs., tit. 23, § 5007 - **Protect Opportunities to Restore Habitat**

Is the covered action inconsistent with this portion of the regulatory policy?

No Action

Answer Justification:

ER P5 / Cal. Code Regs., tit. 23, § 5009 - **Avoid Introductions of and Habitat for Invasive Nonnative Species**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

DWR’s position that ER P5 does not apply is wrong, and conflicts with DWR's attempt at the same time to explain how the project would comply with this policy in its Certification. The project would provide open water space and emergent marsh which may allow non-native species to proliferate, further increasing their overall presence in the region. The action is conducive to the propagation of striped bass (which DWR admits), and other nonnative fish as well nonnative aquatic plants. The creation of levee breaches will create new ambush opportunity locations which will favor nonnative predatory fish. DWR fails to explain how it will manage the project for invasive nonnative species. DWR claims it will be responsible for the management and monitoring responsibilities of the project with oversight and some monitoring from CDFW. However, the Division of Boating and Waterways (DBW) is the lead agency that conducts all invasive nonnative species management (primarily with plants) in the Delta on behalf of the State of California. Similar to DWR and CDFW, DBW is significantly taxed in managing invasive nonnative species throughout the entire Delta. Practically, DBW will not have the dedicated on-the-ground resources and staffing, to effectively manage invasive nonnative plants species at the Lookout Slough project. Additionally, over the last 10 years, invasive nonnative plant species including Water Hyacinth, Brazilian Waterweed, and others have aggressively moved into the Complex. Without a funding mechanism, dedicated on-the-ground personnel assigned to the project, and no-third party oversight, the project will improve and support

habitat for invasive nonnative species, conflicting with the Delta Plan and Policy ER P5. Supporting Evidence: Insights into the Problems, Progress, and Potential Solutions for Sacramento River Basin Native Anadromous Fish Restoration April 2011 by David Vogel. vogel-final-report-apr2011.pdf

DELTA PLAN CHAPTER 5

DP P1 / Cal. Code Regs., tit. 23, § 5010 - **Locate New Urban Development Wisely**

Is the covered action inconsistent with this portion of the regulatory policy?

No Action

Answer Justification:

DP P2 / Cal. Code Regs., tit. 23, § 5011 - **Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

The project does not respect local land uses. The action displaces existing agricultural uses. It also misdirects the use of Proposition 1 funds intended for improvement existing levees most impacted by potential earthquakes and sea level rise, including those required to be improved pursuant to the FEMA required September 15, 1983 State of California Flood Hazard Mitigation Plan for the Sacramento-San Joaquin Delta. Degradation of water quality as to salinity, methyl mercury and propagation of microcystis will result. Existing water quality standards do not prevent the damaging impact of all types of degradation. Even the parameters for protection of particular uses rely on the resulting protection of water quality and flow from other uses, such as fisheries. This projects degrades water quality and reduces flows in trade for habitat . Impacts from restoration projects require ongoing monitoring, maintenance and management, whether in the form of good neighbor policies or formal mitigation measures. The project fails to include adequate mitigation or other commitments for its inconsistencies with local land uses and conflicts with DP P2.

DELTA PLAN CHAPTER 7

RR P1 / Cal. Code Regs., tit. 23, § 5012 - **Prioritization of State Investments in Delta Levees and Risk Reduction**

Is the covered action inconsistent with this portion of the regulatory policy?

Yes, Inconsistent

Answer Justification:

The critical need for investments in Delta levees is for upgrading the nonproject levees in the Central and Western Delta to a minimum acceptable engineering standard. The September 15, 1983 Flood Hazard Mitigation Plan provided that the DWR Bulletin 192-82 agricultural standard be achieved within 20 years. (See CDWA Letter, Attachment G.) Such has not been achieved and the subject project is diverting funding away from achieving these objectives to create new setback levees not included in the Hazard Mitigation Plan. The loss of federal assistance in the event of a Delta flood emergency could be devastating. The DWR Delta Risk Management Strategy estimated that within 100 year flood limits, the replacement costs of Delta Infrastructure would be $56.3 billion in 2005 dollars and $67.1 billion in 2050 dollars. (See CDWA Letter, Attachment K.) The projected costs for achieving the Bulletin

192-82 standard with somewhat widened crown and toe berm in areas of deepest remaining peat soil to better resist earthquake and allow for increased freeboard to accommodate sea level rise is estimated to be under $1 billion. DWR's reference to a $12 billion cost for levee repairs in the Delta is unsupported and does not related to the project's consistency with RR P1. The concentration of funding to place the dirt and rock to maintain the adequate engineering factor of safety requires that the funding not be redirected to other purposes. The objective is not to build invincible levees but to provide resilience to promptly reestablish a freshwater corridor to restore Delta water quality for both in Delta and export water needs. The area shown in red on the 6.5 Magnitude Earthquake 20-Island Failure Scenario, and the islands and tracts shown on page 16 of the Flood Hazard Mitigation plan are the areas in greatest need of investment in risk reduction. (See CDWA Letter, Attachments H and I.) DWR has suggested that Lookout Slough lowered the 100-year flood water surface elevation 0.5-feet. But this reduction only occurs at the northern weir inlet of the project. The remainder of the areas of the same figure show very little impact. At the downstream end of the Lookout Slough Project, the project only lowers the 100-year water surface 0.02-feet. There is no impact at the Cache Slough confluence with Steamboat Slough. Upstream of the project, the impact changes quicky as the water surface along the RD 2068 levee is only lowered 0.11-feet. (See Lookout Slough 100 year flood impacts w/markup.) The Lookout Slough Project was wrongly allocated $21.9 million in funding from Proposition 1 Delta levee funds that were intended to address the most critical statewide needs and priorities. (See CDWA Letter, Attachment F.) The project is clearly not consistent with RR P1, and even if not so funded, would be best replaced with a project located above the projected tidal zone. Supporting Evidence: CDWA February 11, 2021 letter (including Exhibits A-K), requesting that Proposition 1 funds be restored to the intended critical Delta levee repair and improvement. The project does not follow RR P1 priorities. Supporting Evidence: CDWA Letter re: Prop. 1 Funds w Att. A-F CDWA Letter re: Prop. 1 Funds Att. G-K Lookout Slough 100-year Flood Impacts Map/Tables w/markup 21.2.11 CDWA ltr Prop 1 Funds w Att A-F.pdf, 21.2.11 CDWA ltr Prop 1 Funds Att G-K.pdf, Lookout Slough 100-year Flood Impacts.pdf

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